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No. 04-1704

In The
Supreme Court of the United States

DAIMLERCHRYSLER, INC., et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE RIGHT PLACE, INC., AND THE CITY OF GRAND RAPIDS AS *AMICI CURIAE* IN SUPPORT OF PETITION

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QUESTIONS PRESENTED

The *amici curiae* will address the following questions:

1. Whether Ohio's investment tax credit, which is equally available to both Ohio residents and non-residents, violates the "non-discrimination" test this Court has articulated for analyzing whether a state tax program violates the dormant Commerce Clause.

2. Whether the "non-discrimination" test should be clarified as prohibiting only those state laws that both (1) discriminate between resident and foreign goods or businesses *and* (2) harm the national economy.

3. Whether this Court should abandon the dormant Commerce Clause doctrine in the context of state tax programs.

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION

INTEREST OF THE *AMICI CURIAE*[1]

The Right Place, Inc. (The Right Place) is a regional, non-profit economic development organization. Its mission is to promote area economic growth through high-quality employment, productivity, and technology. The program focuses on retaining existing jobs, supporting local business growth, and attracting new businesses to the Greater Grand Rapids, Michigan area.

The City of Grand Rapids (Grand Rapids) is the second largest city in Michigan, with a metropolitan region population of approximately 1,000,000. Grand Rapids has grown by 4% in the last decade – the only major urban Michigan community to do so. This economic development is the result, at least in part, of business tax incentives and other programs that encourage business retention, expansion, and relocation in the region.

The issue of what test courts will apply when evaluating the constitutionality of investment tax credits is of great importance to The Right Place and Grand Rapids. The Right Place and Grand Rapids urge this Court to clarify that the "non-discrimination" standard, used for determining whether a state tax system violates the dormant Commerce Clause, does not bar States from competing with one another for business, an activity that

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[1] Under Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part. In addition to *amici curiae*, their members, and their counsel, Alticor Inc. has made a monetary contribution to the preparation and submission of this brief.

advances the Commerce Clause's objective of achieving an efficient, national economy. Alternatively, The Right Place and Grand Rapids urge this Court to abandon the dormant Commerce Clause doctrine in the context of state tax programs, because the doctrine has no basis in the Constitution and has proved virtually unworkable in application, as various Justices of this Court have frequently observed. Under either of these scenarios, Ohio's investment tax credit will be preserved.

STATEMENT OF THE CASE

The facts relevant to the legal issue presented are as follows:

1. In 1998, the City of Toledo and two local school districts provided a $281 million incentive package to DaimlerChrysler to encourage maintenance of long-standing Jeep production in Toledo rather than construction of new facilities in Michigan. DaimlerChrysler accepted the incentives and opened a new Toledo plant in 2001 that employs approximately 3,800 workers. Sarah A. Webster, *Ohio Tax Credit Struck Down*, Det. Free Press, Sept. 3, 2004, 2d Edition.

2. The incentive package had two components. The first, a ten-year 100% personal property tax exemption, Ohio Rev. Code Ann. § 5709, is worth approximately $210 million. The second, an investment tax credit of 13.5% against the state corporate franchise tax for certain qualifying investments, Ohio Rev. Code Ann. § 5733.33, is worth approximately $71 million. *Id.*

3. All 50 states use some form of business incentive to promote economic development. According to the National Association of State Development Agencies, there are 1,105 different business incentives offered by the 50 states, 40% (or 445) of which are tax-based. *See* Committee to Study State and Local Taxes (created in accordance with Amended Substitute Senate Bill 261 of the 124th General Assembly of the State of Ohio), *Report of the Committee to Study State and Local Taxes* at 70 (published March 1, 2003; visited June 7, 2005) available at <http://tax.ohio.gov/taxstudy/CSSLT%20Final%20Draft.pdf> (hereinafter "Committee Report"). Nationwide, awards under programs similar to those used in Ohio have reached an estimated annual value of nearly $50 billion. Michael D. LaFaive, *Are Targeted Incentives Constitutional?*, Mackinac Ctr. For Pub. Pol'y (Dec. 1, 2003).

4. Respondents – ten Ohio taxpayers, two Michigan taxpayers, and three Ohio small businesses – filed suit over the Toledo incentive package, alleging that it was unconstitutional under the dormant Commerce Clause and Equal Protection Clause of the United States Constitution.

5. A panel of the United States Court of Appeals for the Sixth Circuit held that the investment tax credit, Ohio Rev. Code Ann. § 5733.33, was unconstitutional under the dormant Commerce Clause of the United States Constitution, but that the personal property tax exemption, Ohio Rev. Code Ann. § 5709, was constitutional. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004). The panel acknowledged that "the investment tax credit at issue here is equally available to in-state and out-of-state businesses." *Id.* at 743; *see also id.* at 749 ("The tax benefits under the Ohio statutes . . . are equally available to

domestic and foreign corporations. . . ."). Nonetheless, the panel held the investment tax credit unconstitutional, because the credit had the potential to "coerce" businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state. *Id.* at 743-46. The panel so held even while conceding that the State of Ohio could have achieved the exact same economic effect without violating the Commerce Clause by paying a direct subsidy to benefited companies rather than offering those companies a tax credit. *Id.* at 746.

REASONS FOR GRANTING THE WRIT

This case involves a constitutional question of national importance that affects literally hundreds of tax incentive programs across the country: whether an investment tax credit that is equally available to resident and non-resident businesses violates the dormant Commerce Clause doctrine's "non-discrimination" test. This Court should grant the Petition and answer that question "no," because such an incentive program provides all businesses with equality of opportunity – any business that invests in the taxing state will receive a tax credit. To the extent this Court's dormant Commerce Clause jurisprudence suggests that a court must further examine whether a state tax incentive program has a "coercive" effect, this Court should clarify that investment incentives are constitutionally permissible, provided that they are equally available to residents and non-residents of the taxing state, as does the Ohio tax program at issue here.

Ohio's investment tax credit program also raises broader questions about the efficacy of the "non-discrimination" test and the validity of the dormant Commerce Clause doctrine itself in this context. As various Justices of this Court have recognized, dormant Commerce Clause jurisprudence is a "quagmire," *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977), in large part because the doctrine lacks a textual basis in the U.S. Constitution. The Sixth Circuit's confusion in applying the Court's holdings to the Ohio investment tax credit highlights the need for an immediate clarification of the dormant Commerce Clause doctrine.

This dispute provides an ideal vehicle for articulating a return to the proper and original understanding of the non-discrimination test, namely, a focus on discrimination against "interstate commerce" itself. Under this test, the dormant Commerce Clause prohibits only those state laws that both (1) discriminate between resident and foreign goods or businesses and (2) harm the national economy. Refocusing the inquiry on harm to the national economy will at least reduce, if not completely eliminate, the quagmire, and it will also correct an error of potentially monumental proportions, given the pervasiveness of state tax incentive programs like Ohio's. That is because the test does not bar competition between states *per se*, recognizing instead that competition can be consistent with the Commerce Clause's goal of promoting an efficient, integrated, national economy and will ultimately result in more, not less, commerce.

Alternatively, the Court should abandon the dormant Commerce Clause doctrine for evaluating state tax programs. Numerous other provisions in the United States Constitution are available to protect against true monopolistic abuses of

power in such programs, and the Constitution fully authorizes Congress to rectify any perceived problems when these other protections are unavailable.

Although the Court will sometimes wait until an issue "matures" through study and interpretation by a number of lower courts, the bewildering array of dormant Commerce Clause precedents and the pervasiveness of state investment tax credit programs like Ohio's make it a virtual certainty that a circuit split will emerge. Indeed, the present dispute over Ohio's investment tax credit has been widely trumpeted as a "test" case for a national, full-scale assault on similar programs in other states. In addition, even temporary uncertainty regarding the validity of an investment tax credit may result in the loss of valuable business investment, perhaps to a competing state, but more likely to a competing country. The national economic harm that will result from the Sixth Circuit's decision, as well as the sheer enormity of future litigation, counsel strongly in favor of the Court's immediate review.[2]

I. OHIO'S INVESTMENT TAX CREDIT DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE DOCTRINE, BECAUSE THE CREDIT IS EQUALLY AVAILABLE TO IN-STATE AND OUT-OF-STATE BUSINESSES.

The United States Constitution authorizes "Congress ... To regulate Commerce with foreign Nations, and

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[2] Plaintiffs do not disagree with the propriety of this Court's review, as noted in their own Petition for a Writ of Certiorari: "In light of the importance of the issues raised by this case, [Plaintiffs] do not intend to oppose [Defendants'] anticipated petitions for review of the constitutionality of Ohio's investment tax credit."

among the several States. . . ." U.S. Const. art. I, § 8, cl. 3. On its face, the Commerce Clause authorizes Congress, rather than the courts, to ensure "an area of trade free from interference by the States." *Boston Stock Exchange*, 429 U.S. at 328. Nonetheless, this Court has grafted a "negative" or "dormant" aspect to the Commerce Clause, to limit the States' right to tax interstate commerce. *Cuno*, 386 F.3d at 742.

This Court articulated the current test for measuring state tax programs against the dormant Commerce Clause doctrine in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).[3] Under that test, a tax provision is constitutionally valid if "(1) the activity taxed has a substantial nexus with the taxing State; (2) the tax is fairly apportioned to reflect the degree of activity that occurs within the State; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to benefits provided by the state." *Cuno*, 386 F.3d at 742, citing *Complete Auto Transit*. Here, the parties agree that the Ohio investment tax credit satisfies parts one, two, and four of the *Complete Auto Transit* test; the only dispute is whether Ohio's tax program violates the "non-discrimination" test.

There is nothing "discriminatory" about the Ohio tax program. Even the Sixth Circuit panel properly recognized that "[t]he tax benefits under the Ohio statutes . . . are equally available to domestic and foreign corporations and

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[3] The Court has adopted – and disposed of – many other tests under the doctrine. *See American Trucking Assocs. v. Michigan Public Serv. Comm.*, 125 S. Ct. 2419, 2426 (2005) (Scalia, J., concurring) (cataloguing the "various tests from [the Court's] wardrobe of ever-changing negative Commerce Clause fashions").

classify corporations on the basis of new investment in economically depressed areas." 386 F.3d at 749; *see also id.* at 743 ("the investment tax credit at issue here is equally available to in-state and out-of-state businesses").

This equality of opportunity exists because the Ohio corporate franchise tax and accompanying investment tax credit apply only to business activity that takes place in Ohio. *See generally* Ohio Rev. Code Ann. §§ 5733.05, 5733.33. And the fact that Ohio's tax applies only to Ohio business activity distinguishes it from the tax programs this Court held unconstitutional in the three dormant Commerce Clause cases on which the panel relied, *Boston Stock Exchange*, 429 U.S. 318 (1977), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), each of which involved a tax on out-of-state business activity. *See Cuno*, 386 F.3d at 744 (noting that in *Boston Stock Exchange*, the tax program "caused transactions involving out-of-state sales to be taxed more heavily than transactions involving in-state sales"); *id.* (discussing *Maryland v. Louisiana*, which involved Louisiana's first-use tax on natural gas extracted from the federally owned outer continental shelf); *id.* at 744-45 (analyzing *Westinghouse*, which involved New York's tax on Domestic International Sales Corporation (DISC) subsidiaries without regard to where the DISC conducted or transacted business).[4] Accordingly, the Ohio investment tax credit is constitutional, and this Court should grant the Petition and reverse.

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[4] Indeed, Westinghouse argued that New York "was taxing income that did not have a jurisdictional nexus to the State." 466 U.S. at 395-96.

II. THIS COURT SHOULD ACCEPT THE PETITION TO CLARIFY THE "NON-DISCRIMINATION" PART OF THE DORMANT COMMERCE CLAUSE TEST.

Notwithstanding the equality of opportunity available to residents and nonresidents under Ohio's investment tax program, the Sixth Circuit struck down the program for violating the dormant Commerce Clause. The panel reached its conclusion based on plaintiffs' argument that Ohio is "coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state." *Cuno*, 386 F.3d at 743.

Respondents' "coercion" or "anti-incentive" argument is suggested by *dicta* in some of this Court's decisions, as the panel observed. In *Boston Stock Exchange*, for example, this Court criticized New York's exchange tax program because it "foreclose[d] tax-neutral decisions." 429 U.S. at 331. Similarly, in *Maryland v. Louisiana*, this Court disapproved of Louisiana's first-use tax because it "encourage[d] natural gas owners involved in the production of [offshore] gas to invest in mineral exploration and development within Louisiana rather than to invest in further [offshore] development or in production in other States." 451 U.S. at 757. In other words, there is language in at least some of this Court's decisions that appears to endorse the notion that the "non-discrimination" test looks to equality of outcome, rather than or in addition to equality of opportunity. Under such a test, a tax program will be invalidated if the expected change in business behavior results in a benefit to one state at the expense of other states. Indeed, it was on this basis that the Sixth Circuit distinguished and sustained Ohio's personal property tax exemption. *See* 386 F.3d at 747-48 (citing a

law review article explaining why a personal property tax exemption is "non-coercive").

The problem with an equality of outcome test for evaluating "non-discrimination" is that state competition or incentive for business investment can and often will advance the Commerce Clause objective of achieving an efficient, integrated national economy. If a business entity moves to a state where it will be more productive and contribute more to the national economy, the macro objective of an efficient, integrated economy will be advanced, even though the micro effect may be to disadvantage the economy of the deserted state. As one commentator has observed:

> If national wealth enhancement was a primary objective of the federalizing bargain, then efforts to increase the size of the social pie, by matching firms with their most productive jurisdiction, is not inconsistent with that bargain. To the contrary, it is entirely consistent as long as those economies, once realized, are available to all. Policies that have this purpose or effect are qualitatively different from a statutory scheme that merely transfers wealth or that creates an artificial monopoly that frustrates transactions that would otherwise occur.

Clayton P. Gillette, *The Law and Economics of Federalism: Business Incentives, Interstate Competition, and the Commerce Clause*, 82 Minn. L. Rev. 447, 483 (1997).

Moreover, when carried to its logical conclusion, the broader test for "non-discrimination" that the Sixth Circuit articulated and applied will result in absurd outcomes. For example, if Ohio chooses to attract more business investment by eliminating its business tax

completely, no one could dispute that Ohio is free to join the other states that have already done so. But under the Sixth Circuit's broad test, elimination of all business taxes is "discriminatory," because it benefits only businesses located in Ohio, impermissibly incentivizing non-Ohio businesses to relocate there. This result makes no sense, yet, it is the natural consequence of a broader test that examines equality of outcome rather than equality of opportunity. *See* Edward A. Zelinsky, *Cuno v. Daimler-Chrysler: A Critique*, 34 State Tax Notes 37, 38 (Oct. 4, 2004).

In sum, if this Court is to continue recognizing a dormant Commerce Clause doctrine in this context at all, it is essential that the Court make clear that state incentives are not inherently unconstitutional. Rather, it is only when a state incentive diminishes the *national* economy that it runs counter to the Commerce Clause. "The free flow of interstate commerce is not an end in itself; it is an instrumental good, valued for its contribution to the efficient operation of the national economy." Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 Wm. & Mary L. Rev. 1191, 1216 (1998); *see generally American Trucking Assocs. v. Michigan Public Serv. Comm.*, 125 S. Ct. 2419, 2423 (2005) (the dormant Commerce Clause "prevents a State from 'jeopardizing the welfare of the Nation as a whole'") (quotation omitted); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949) ("this Court has advanced the solidarity and prosperity of the Nation" by applying the dormant Commerce Clause doctrine). Thus, to the extent the "nondiscrimination" test evaluates equality of outcome instead of or in addition to equality of opportunity, as the Sixth Circuit held, the test must be clarified to conform with the

original understanding of the test. In other words, a tax cannot discriminate against "interstate commerce" itself. *Cuno*, 386 F.3d at 742 (citing *Complete Auto*). Under this test, a state tax incentive program is invalid only if it both (1) discriminates between resident and foreign goods or businesses *and* (2) harms the national economy.

This "harm to the national economy" standard explains why state tariffs are "virtually *per se* invalid" under the dormant Commerce Clause. *Camps Newfound/ Owatonna v. Town of Harrison*, 520 U.S. 564, 565 (1997) (Thomas, J., dissenting) (citations omitted). A tariff artificially inflates the cost of competing goods, driving up prices and thus lowering demand. An escalating tariff war between competing states will inevitably result in a net decrease in commerce, the very evil the dormant Commerce Clause doctrine was created to prevent.

The "harm to the national economy" standard also explains why subsidies do not "ordinarily run afoul" of the Commerce Clause. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). Unlike a tariff, a subsidy artificially deflates the cost of competing goods, thereby lowering prices and increasing demand. An escalating subsidy war between competing states will result in a net increase in commerce.

Applying this test to the present case, Ohio's investment tax credit is permissible because, if replicated in all states that impose a business tax (the so-called "internal consistency" test, *see American Trucking*, 125 S. Ct. at 2425), it would result in lower corporate taxes and more national commerce. Just as states are permitted to compete for business investment based on their climate and the quality of their workforce, they should be allowed to

use subsidies and tax abatements to bid for scarce investment resources, because competition is an effective way to allocate resources to the party that most highly values them:

> Certainly those law professors who contend that federal intervention is necessary to prevent states from engaging in explicit bidding for businesses have not suggested that there exists any Commerce Clause barrier to state law schools offering some salaries out of line with those of others in order to attract or retain faculty members.

Gillette, 82 Minn. L. Rev. at 450.

A "harm to the national economy" test is also consistent with the precedent on which the Sixth Circuit relied below. In *Westinghouse*, the New York tax program increased tax liability proportionately with increases in export shipping activities in other states. *Cuno*, 386 F.3d at 745. If replicated in all states, this scheme would raise taxes nationally, just like a tariff, thus stifling commerce. The same is true in *Boston Stock Exchange*, where the New York tax program "caused transactions involving out-of-state sales to be taxed more heavily than transactions involving in-state sales." *Cuno*, 386 F.3d at 744. The anti-commerce effect was also present in *Maryland v. Louisiana*, where, if every state replicated Louisiana's tax program, all Outer Continental Shelf gas exploration and development would cease, notwithstanding the potential national economic benefits of pursuing OCS development.

In sum, a "harm to the national economy" test would first ask whether a state tax program treats in-state and out-of-state goods or businesses differently. The test would then examine whether the program will create a spiral of

protectionism that raises prices and clogs commerce, or inspires a competitive transformation in which each state must improve its own package to attract new capital.[5] This test, unlike the "non-discrimination" test the Sixth Circuit applied, draws a clear distinction between a tax program creating an artificial monopoly that inhibits transactions, and a program designed to attract investment by creating a competitive advantage that other states are free to copy.

III. ALTERNATIVELY, THIS COURT SHOULD ABANDON THE DORMANT COMMERCE CLAUSE DOCTRINE IN THE CONTEXT OF STATE TAX PROGRAMS.

Although it is possible to preserve the dormant Commerce Clause doctrine while allowing states to compete for business investment, the fact remains that the doctrine "has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." *Camps Newfound/Owatonna*, 520 U.S. at 610 (Thomas, J., dissenting). Moreover, the doctrine alters the constitutionally proscribed balance of federalism by vesting interstate dispute resolution in the judiciary, instead of Congress, and it lacks a theoretical justification despite years of academic and judicial effort. The time is ripe for this Court to consider whether the doctrine should

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[5] "Discrimination" is still a necessary part of the test, even if the program is otherwise harmful to commerce. A state sales tax, for instance, if replicated in every state, would have the effect of raising prices and clogging commerce, but it does not violate the Commerce Clause because it is applied equally to all goods sold within a state's borders. All goods, whether produced in-state or out-of-state, have equality of opportunity.

be abandoned entirely in the context of state tax programs.

The dormant Commerce Clause doctrine started quite innocently. Shortly after the thirteen colonies ratified the Articles of Confederation, they began to enact protectionist trade barriers:

> Massachusetts goods, for example, were subject to discriminatory duties in Connecticut, and Delaware goods were subject to similar duties in Pennsylvania. New York imposed clearance fees on coastal ships visiting its ports, and also imposed fees on boats carrying vegetables that were rowed across the Hudson River. Discriminatory duties almost immediately invited retaliation by other states in the form of imposition of similar duties.

Joseph F. Zimmerman, *Interstate Relations: The Neglected Dimension of Federalism* 117 (1996). *Accord Granholm v. Heald*, 125 S. Ct. 1885, 1895 (2005) ("The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. . . . Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented.") (citations omitted).

Following the Constitution's ratification, this Court fashioned the dormant Commerce Clause doctrine to prevent the type of protectionist behavior evidenced during the days of the Articles of Confederation. As this Court stated in 1949:

> Neither the power to tax nor the police power may be used by the state of destination with the

> aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce.

H.P. Hood & Sons, 336 U.S. at 539.

Since that time, however, this Court's foray into dormant Commerce Clause jurisprudence has wandered "well beyond the invalidation of obviously discriminatory taxes on interstate commerce." *Camps Newfound/ Owatonna*, 520 U.S. at 618 (Thomas, J., dissenting). In addition, the jurisprudence has failed to recognize, let alone adapt to, the increasing fluidity of economic transactions in a global economy.

When the doctrine was first created, a complex commercial transaction involved rowing vegetables across the Hudson River. Now, in a time when the gross revenue of some multi-national corporations exceeds the Gross National Product of many countries, Ohio competes not only with Maryland, but with Malaysia, Moldova, and Mexico for the benefits flowing from commercial transactions. *See* Vada Waters Lindsey, *Tax Incentive: The Vulnerability of Using Tax Incentives in Wisconsin*, 88 Marq. L. Rev. 107 (2004) (stating that "[m]ore than three million jobs have been lost in the United States during the last three years. Since March 2001, manufacturing jobs accounted for 90% of all job losses. Many jobs were lost to China, India, and Mexico."); Dave Carpenter, *Manufacturing Shifts Sow Uncertainty*, Chi. Trib., Dec. 8, 2003, at 6 ("There's no statistical quibble about the impact of overseas competition. Numerous companies, from heavyweight multinational corporations to comparatively small firms,

have switched production to low-priced labor sites in China, India or Mexico.").

Meanwhile, the doctrine's shifting meaning and indeterminate tests have resulted in differing results "based merely 'on differing assessments of the force of competing analogies.'" *Camps Newfound/Owatonna*, 520 U.S. at 619 (Thomas, J., dissenting, quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 196 n.7 (1995)). And numerous past and present Justices of this Court have criticized the doctrine as nothing less than a morass. *See, e.g., Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 17 (1986) (Burger, C.J., concurring in part) (referring to "the cloudy waters of the Court's 'dormant Commerce Clause' doctrine"); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 701 (1981) (Rehnquist, J., dissenting) (recognizing that "the jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused"); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959) (Clark, J.) (stating that the dormant Commerce Clause doctrine is a "tangled underbrush"); *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 189 (1940) (Black, J., joined by Frankfurter and Douglas, J.J., dissenting) (criticizing the dormant Commerce Clause as arising out of "[s]pasmodic and unrelated instances of litigation [that] cannot afford an adequate basis for the creation of integrated national rules" that "Congress alone" is positioned to develop).

The present dispute is illustrative of the confusion and ambiguity the doctrine engenders. Respondents articulated below *eight* different tests for determining whether a tax was discriminatory. *See* Appellants' Br. at 22, 29. Petitioner DaimlerChrysler responded to many of

these tests, then added another. *See* Appellee Daimler-Chrysler's Br. at 29-34 (stating that "the credit's similarity to a subsidy should be decisive"). Appellee State of Ohio recognized that "[t]he parties completely disagree . . . on the lessons to be drawn from a careful analysis of the case law." *See* Appellee State of Ohio's Br. at 15.

In light of the pervasive problems the doctrine has caused, it is more than a little ironic that legislation has often cured state tax policies perceived to be anticompetitive, the very remedy that the Commerce Clause's text plainly endorses. For example:

> [T]he tax exemptions at issue in *Bacchus* were designed to expire and did expire. Thus, Hawaii's internal political processes ultimately eliminated those exemptions. Similarly, as to New York's securities transfer tax, Congress legislated while *Boston Stock Exchange* made its way through the courts. In the same vein, Congress has long legislated on the subject of milk prices and supports.

Edward A. Zelinsky, *Restoring Politics to the Commerce Clause*, 29 Ohio N.U.L. Rev. 29, 84 (2002);[8] *accord Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) (validity of a state tax program "is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve"). In short, Congress, the People's elected representative body, can and should decide in the first instance whether it is acceptable for Ohio to

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[8] Conversely, Congress has also acted at times to give its blessing to challenged tax programs. *See, e.g.*, the McCarren-Ferguson Act, 15 U.S.C. § 102(a) ("The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.").

enact a tax credit program that encourages investment in Ohio.

Abandoning the dormant Commerce Clause doctrine in the context of state tax programs would not leave the states exclusively with a legislative remedy when faced with an alleged anti-competitive tax. Numerous other constitutional provisions have been and will continue to be used to strike blatantly protectionist tax programs. *See, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 879-80 (1985) (rejecting dormant Commerce Clause challenge but holding that Alabama's higher gross premiums tax on foreign insurers violated the Equal Protection Clause); *Toomer v. Witsell*, 334 U.S. 385, 396-98 (1948) (higher license fee on nonresident shrimp fishermen violated the Privileges and Immunities Clause); *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 13-15 (1983) (invalidating Hawaii gross receipts tax imposed on airlines, concluding the tax was preempted under the Supremacy Clause by the Airport Development Acceleration Act of 1973); *cf.* U.S. Const. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . .").

In sum, the time is ripe to extract the federal courts from the impenetrable "quagmire" that is the dormant Commerce Clause and return the job of overseeing competing state tax programs to Congress. This Court should take the opportunity presented by this case to grant the Petition and abandon the doctrine as applied to state tax programs.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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